U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

D7

FILE: EAC 02 145 51670 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary

MAY 21 2004

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

SELF REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims to be engaged in the business of importing and exporting clothing, jewelry, and perishable food items. It seeks authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. On appeal, the petitioner disputes the director's findings and submits a separate brief addressing each of the director's objections.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3)(v) state that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

A) Sufficient physical premises to house the new office have been secured;

B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The U.S. petitioner stated that it was established in 2002 and claimed in the petition to be a branch of Zimba Traders & Co., Ltd., located in Bangladesh. The petitioner seeks to employ the beneficiary in the United States for an initial stay of three years in order to open the new office. The petitioner stated that the beneficiary would receive a salary of $400 per week.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
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> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted a business plan covering the amount of the foreign entity's investment. Although the petitioner also submitted the beneficiary's resume and a number of other documents, it failed to submit a description of the beneficiary's proposed duties. Therefore, on April 19, 2002, CIS issued a request for additional evidence. The petitioner was asked to provide a number of documents, including a comprehensive description of the beneficiary's proposed duties and the breakdown of hours devoted to each duty on a weekly basis. The petitioner was asked to provide the same information for all of its other proposed employees.

The petitioner responded with the following list of the beneficiary's duties:

1. Work as the CEO of the company.
2. Supervise the office administration.
3. Hire and fire employees as and when necessary.
4. Plan business and execute them.
5. Keep accounts and submit copies of accounts summary quarterly to the head office.
6. Operate bank accounts of the company.
7. Comply with the requirements of law of the USA.

The petitioner also provided a list of six individuals, aside from the beneficiary, claiming that these individuals are the petitioner's prospective hires. The following position titles and job descriptions were provided: vice president, in charge of sales; director, in charge of procurement and accounts; manager, in charge of sales and purchase; supervisor, in charge of purchase; "store-in charge," supervising the store and delivery; and sales associate, in charge of receiving cash and issuing invoices. The petitioner indicated that all of the employees would work a 40-hour week, but did not indicate how much of that time would be devoted to specific tasks that comprise that week. The petitioner also failed to provide a comprehensive list of duties for any of its employees. Although the petitioner submitted a proposed organizational chart, many of the positions listed in that chart did not match the list of position titles for the petitioner's projected hires. For instance, the organizational chart lists the positions of general manager, treasurer, and secretary. All three positions are listed as the tier of employees directly below the beneficiary's position. None of these three positions, however, are listed among the position titles of the petitioner's projected hires. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director denied the petition noting the petitioner's failure to provide an hourly breakdown of duties for each of the petitioner's proposed employees. The director concluded that the petitioner failed to provide sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity.

On appeal, the petitioner first claims that the director's denial is arbitrary in regard to the size of the petitioner's personnel. A review of the denial shows that the director found the petitioner's claim of currently employing two individuals inconsistent with its claim that it expects to fill a total of seven positions. The director's concern in this regard, however, was misplaced. The director has acknowledged that the petitioner is considered a "new office" that is currently in the initial stages of development and is seeking to hire the beneficiary to preside over the petitioner's operation. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). As such, it is not unreasonable for the petitioner to hold off on hiring an entire staff. However, the director properly questioned the actual job duties of the beneficiary's subordinates given the managerial and executive job titles of an overwhelming majority of the petitioner's staff. The petitioner claims that the director's inquiries in this

regard are inappropriate given the petitioner's submission of an organizational chart. However, the organizational chart is unsupported by the evidence of record and leaves the AAO to question which positions the petitioner is seeking to fill and what job duties the employees would perform once hired. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's second objection is in regard to the director's determination that the petitioner failed to submit hourly breakdowns of duties for the petitioner's proposed employees. The petitioner states that this determination is incorrect and resubmits the names, position titles, and number of individuals it plans to eventually hire. However, as previously mentioned in this discussion, providing a list of job titles and their total number of hours projected on a weekly basis is not synonymous with a breakdown of the projected number of hours each employee will spend on each duty he or she will perform. Such information is crucial for the purpose of establishing that the beneficiary's subordinates, rather than the beneficiary himself, will perform the operational tasks on a daily basis. Merely providing a position title and a one-word description of that person's job does not adequately indicate what tasks each employee will perform, thereby making it virtually impossible for the AAO to conclude that the beneficiary will be relieved from having to perform non-qualifying tasks. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner also defends the description of the beneficiary's duties it provided earlier in response to the request for additional evidence. The petitioner claims that the duty of working as the company's CEO is self-explanatory and focuses on the discretionary authority the beneficiary would have by virtue of being in charge of the petitioner's entire operation. While the AAO does not dispute the discretionary authority with which the beneficiary would likely be vested as the president of the petitioning organization, there is nothing self-explanatory about the beneficiary's proposed duties. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As such, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant case, the petitioner failed to provide any specifics of the beneficiary's proposed job duties, thereby leaving the AAO to speculate as to what the beneficiary would actually be doing on a daily basis and whether his duties would be primarily managerial or executive. This distinction of duties is germane, as an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Rather than providing a more specific description of the beneficiary's daily duties, the petitioner merely repeats the vague list provided earlier in its response to the request for additional evidence.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization or that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. There is no evidence that the beneficiary will be relieved from performing non-qualifying duties. The record does not demonstrate that the beneficiary will primarily manage an essential function of the organization. Based

on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petition indicates that the petitioner is a branch of the foreign entity. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. In the instant case, the record contains state tax documentation and a Certificate of Incorporation, which indicate that the petitioner has incorporated in the state of New York and is a separate entity from its foreign counterpart. Accordingly, the AAO will review the record to determine whether the petitioner and the foreign entity share common ownership and control.

The record contains the foreign entity's Articles of Association indicating that the beneficiary owns 80% of that company's shares, as well as the petitioner's stock transfer ledger indicating that the foreign entity owns 200 shares while the beneficiary owns 100 shares of the petitioner's stock. Although these documents suggest that the petitioner may be a subsidiary of the foreign entity, as defined by 8 C.F.R. § 214.2(l)(1)(ii)(K), the record lacks evidence to indicate that the foreign entity actually paid for its ownership of the petitioner's stock. The record contains three bank notices, dated February 26, March 1, and March 11 of 2002, documenting fund transfers into the petitioner's U.S. bank account. However, the foreign entity was not the originator of any of the fund transfers. An individual named Mohammad Obydur Rahman Riazuddin ordered each of the three fund transfers. The record contains no evidence suggesting that the foreign entity was the source of funding for the petitioner's start-up capital. As stated previously, going on record without

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For the additional reasons discussed in this paragraph, this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.